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IN THE

SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1928.**

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**No. [redacted] 6, ORIGINAL**

---

**IN EQUITY.**

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THE STATE OF LOUISIANA, COMPLAINANT,

*versus*

THE STATE OF MISSISSIPPI, DEFENDANT.

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# SUPPLEMENTAL BRIEF OF STATE OF LOUISIANA, COMPLAINANT.

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PERCY SAINT,
*Attorney General of Louisiana,*
GERARD BRANDON,
JOHN DALE,
ROBERT ASH,
*Of Counsel for the State of Louisiana.*

PHILIP HOUGH,
GERALD H. BRANDON,
JOHN DALE, JR.,
L. D. DALE,
*Solicitors for the State of Louisiana.*

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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1928.**

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# No. 9, ORIGINAL.

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**IN EQUITY.**

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THE STATE OF LOUISIANA, COMPLAINANT,

*versus*

THE STATE OF MISSISSIPPI, DEFENDANT.

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## SUPPLEMENTAL BRIEF.

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*To the Chief Justice and to the Associate Justices of the Supreme Court of the United States:*

This supplemental brief is filed to answer the two defenses set up by defendant in its brief which we did not receive until the 15th of September, 1928, and then only in typewritten carbon copy.

**Complainant's Contention**

is that the original boundary line between the States of Louisiana and Mississippi, in East Carroll Parish, La., and the point in the State of Mississippi, known as Albemarle Bend, was the Mississippi River, as shown by the earliest Government land survey in Mississippi of 1823 and in Louisiana of 1824. That at this place Willow Point Plantation was on the Louisiana side and Albermarle Bend was on the Mississippi side of the river, Louisiana being on the convex side of the bank and Mississippi on the concave side. That subsequently to said surveys, the Louisiana shore gradually and continuously extended by accretion in an easterly and afterwards in a northeasterly direction toward the Mississippi shore, which receded by erosion, cutting away its banks, the Louisiana shore progressively following the recession of the Mississippi shore. That this condition continued until all of Tullos Island, or Island 98, originally in Mississippi in Albemarle Bend, and all other contiguous islands or sandbars on the Mississippi side of the river had disappeared, being washed away by the river, until the Louisiana shore had built by accretion over the location formerly occupied by Tullos Island as well as over what had formerly been other Mississippi property. That this condition continued until 1912 and 1913, when an avulsion of the Mississippi River took place through Willow Point, being Newman's bar, leaving considerable of the said bar and Newman's

Towhead on the Mississippi side of the river. That Willow Point property, prior to 1876, belonged to Walter R. Newman. That on the outer edge of the Willow Point bar a towhead built up. This towhead was called Newman's Towhead, and was connected with the said bar. That this towhead continued to grow in size and height and extended by accretion, together with the balance of Willow Point bar, gradually and continuously toward the State of Mississippi until the said avulsion of 1912-1913.

That all of the property in dispute, including Newman's Towhead, was Louisiana territory prior to the avulsion of 1912-1913, and remained so thereafter, and is now Louisiana property, the towhead being a high point on the sand bar.

That what ~~plaintiff~~ defendant claims is Tullos Island, or Island 98, or some other island that was Mississippi territory, is in fact Newman's Towhead, which covers a large part of the same position once occupied by Tullos Island and other territory formerly of Mississippi.

While the above is the main contention of complainant, it contends that it is immaterial whether the original soil now constituting Newman's Towhead or bar was made to the Louisiana bank by accretions or formed in the Mississippi River, as a towhead or island, provided that said formation was west of the channel of the Mississippi River, as in such event it would be Louisiana territory, just as accretions would be, and all accretions that might thereafter attach to said island or towhead would likewise be Louisiana territory.

That Louisiana had absolute and sole dominion over the property in controversy until after the avulsion in 1912-1913, and has never recognized any right thereto in the State of Mississippi.

In Defendant's Statement of Facts (Brief, page 2) it is set forth that "the territory in dispute was originally surveyed as a part of Mississippi and is described as a part of Sections 9, 10, 15, 16, and 17, all of Sections 20 and 21, and a part of Sections 22, 28, 29, and 30, all in T. 9 N., R. 6 W., Choctaw District, as shown by the United States Governmental Survey of 1823."

Whilst the land now in dispute may occupy the position occupied by lands above described as surveyed in 1823, this is a mere incident to the controversy before the court; for the claim of complainant, State of Louisiana, is not made with reference to land as described by Section, Township and Range, but is a claim to all lands which by accretion formed in the Mississippi River and attached to the Louisiana shore at the point described in the bill of complaint and which accretion gradually extended in a general easterly direction as the Mississippi River receded and as said accretion existed at the time of the cut-off of 1912-1913—the boundary line between the States of Louisiana and Mississippi thereupon becoming fixed in the center of the thalweg, or channel, which at the time of said avulsion lay between said accretions to the original soil of Louisiana and the Mississippi mainland of 1912-1913.

Defendant's Statement of Facts (Brief, page 2), referring to the United States Governmental Survey of 1823, correctly states "when this survey was made Fractional Section 20, Lots 2, 3, 4, and 5 of Section 21, Lots 3 and 4 of Section 28, all of Section 29, and Fractional Section 30 composed what was known as Tullos Island, later as Island 98." This is a correct statement as to what composed Tullos Island and is correctly shown on Defendant's Exhibit No. 2 to the testimony of defendant's witness, Horace Marshall. These sections embraced the whole of Tullos Island, or Island 98. Said Tullos Island, or Island 98, as shown by reference to said exhibit, lay entirely south of the south line of Sections 16, 17, and 18, of T. 9, R. 8 W., Choctaw District, in the State of Mississippi, and was separated from said line by a chute designated on said land survey and also designated on said Mississippi River Sheet No. 17; said Island 98, or Tullos Island, thus limited and defined, being bounded on the westerly side by the main channel of the Mississippi River and being bounded north, east, and south by said chute roughly in the shape of an elongated horseshoe.

**Defendant's Contention.**

Defendant bases its defense on two propositions:

FIRST.

That complainant has failed to prove that the Mississippi River gradually moved eastward from its

1823 channel to the 1882 channel, and that the Louisiana shore line progressively followed it by accretion.

That if this is true, any accretions that attached to the west shore subsequent to the year 1882 wholly fails to prove that such accretions become attached to territory belonging to the State of Louisana, and in such event complainant's claim must be rejected; that the burden of proof is on complainant.

Complainant denies this contention of defendant.

Complainant's answer to this is that it has proved that said accretions attached to the Louisiana shore; but that if it has failed to make such proof, this would be immaterial, provided complainant has shown that such accretions attached to a towhead, or island, which had formed in the river west of the channel.

That if the testimony shows that Newman's Towhead existed, and that it formed west of the channel, though not attached to the bank, then all accretions thereto were Louisiana property at the time formed, was Louisiana property in 1882 and in 1913, at the time of the avulsion, and is now Louisiana property. That one or the other of complainant's contentions has been established and the court must render judgment in favor of complainant.

SECOND.

That if complainant has established that the accretions originally attached to the Louisiana bank, and that said shore line has been progressively added thereto by accretion until 1882, that complainant must

fail, because *defendant's proof tends to show that* subsequent to the year 1882 the Mississippi River above and to the *west of Willow Point* cut into the Louisiana shore deflecting the current from a *southeasterly* direction to a *northeasterly* direction; that because of this deflection in its course, the river cut around the head of and to the north and east of what was left of Tullos Island at some time prior to 1894, scouring out the old chute between the island and the Mississippi shore, and making a new channel there; *that the old bed of the river filled up, so that Tullos Island became attached to the Louisiana shore;* that the river continued to cave the Mississippi shore, adding to the island by accretion until the year 1912 or 1913, when it suddenly abandoned *its new channel* and went back to the old 1882 channel, leaving Tullos Island again, and in truth, an island, but greatly enlarged by the accretions added thereto. That Tullos Island was divided into two parts. Upper and lower. The evidence fails to show such, but on the contrary only shows that one Tullos Island ever existed.

Defendant also contends that the burden of proof is on complainant to negative this contention of defendant.

Complainant also denies this second contention of defendant.

This contention of defendant is disputed by complainant, it contending that Tullos Island, or Island 98, was washed away by the river in 1894, or prior thereto, and that not a vestige of it left; that this has

been established by the evidence, and this second contention of defendant must fail.

**Answering Defendant's First Contention.**

That complainant has failed to prove that the Mississippi River gradually moved eastward from its 1823 (1824) channel to the channel of 1882, and that the Louisiana shore line progressively followed it by accretion.

Complainant denies that it has failed to make such proof, but contends that this fact has been clearly established by a preponderance of the evidence.

This is shown by surveys made in the following years: 1824, 1866, 1870, 1882. The survey of 1894 shows a continuation of the accretions to the Louisiana shore.

There is no dispute as to the Louisiana bank line shown on the original survey of 1824. There is no dispute that the Louisiana bank line never extended west of the line of 1824.

Complainant introduced in evidence on the trial, *without objection*, four blue prints, made from drawings of Capt. Chas. H. West, Consulting Engineer, Greenville, Miss. (R., 129).

Captain West is a member of the Mississippi River Commission. The blue prints are marked Exhibits G, H, I, and J.

Each of these exhibits has the Louisiana "*1866 bank line*" plainly marked thereon.

As early as 1866 there had been some caving on the north of Willow Point, and no addition had been made

to Sections 1, 2, and 3 of this property; in fact, they had caved some, which will be discussed later.

The accessions to the Louisiana bank line began near the upper section line of Section 4, and extended down the river to about the middle of Section 8, where said section reached the river.

The extensions of the Louisiana bank line from 1824 to 1882, as shown by the various surveys at points of greatest extension, are as follows, to wit:

Between 1824 and 1866, 439 yards, or two-eighths of a mile.

Between 1866 and 1870, 1,099 yards, or five-eighths of a mile.

Between 1870 and 1882, 1,245 yards, or six-eighths of a mile.

These progressive extensions are shown on the following table:

*Table Showing Successive Accretion to Louisiana.*

Taken from Complainant's Exhibit "G."

This tabulation covers the fan-shaped township 19 N. R. 14 E., in East Carroll Parish, La., and includes what is known as Willow Point. It is composed of sections 1 to 9. It begins by showing in inches the length of the upper and lower side of each section line of said sections 4 to 9 at the time of the original government land survey of Louisiana in 1824, each of said sections beginning at a common point on the range line dividing ranges 13 and 14, all of said section being in range 14.

It then shows the distance in inches from said common point of said sections, lines beginning with the lower line of section 4, and to and including section 9, as shown by the survey of 1866, and then shows the difference in inches of said section lines between 1824 and 1866, and then shows the said difference in yards, so that it may be determined at a glance the number of yards the shore line had extended between 1824 and 1866.

Similar facts are also shown as to the surveys of 1870 and 1882, the object being to show the gradual and continuous advance, by accretion of the Louisiana shore line toward the Mississippi shore line.

Plaintiff's Exhibit "G" is on a scale of 1 to 20,000, which is to say 3⅛ inches to 1 mile. We used, to avoid fractions, 3 inches to 1 mile, which does not materially change the result.

*Table Showing Yards in from ⅛ of an Inch to 1 Inch, One Inch Being 586 Yards.*

| Inch | | Yards |
|---|---|---|
| 1/8 | = | 73 |
| 2/8 | = | 146 |
| 3/8 | = | 220 |
| 4/8 | = | 293 |
| 5/8 | = | 366 |
| 6/8 | = | 440 |
| 7/8 | = | 513 |
| 8/8 | = | 586 |

| Sections | Length of upper and lower section lines Sections 1 to 9 | Inches in 1824 | Inches in 1866 | Difference in inches between 1824 and 1866 | Difference in yards between 1824 and 1866 | Inches in 1870 | Difference in inches between 1866 and 1870 | Difference in yards between 1866 and 1870 | Inches in 1882 | Difference in inches between 1870 and 1882 | Difference in yards between 1870 and 1882 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | Upper | ..... | ..... | ... | ... | ..... | ..... | .... | ..... | ..... | .... |
| 1 | Lower | ..... | ..... | ... | ... | ..... | ..... | .... | ..... | ..... | .... |
| 2 | Upper | ..... | ..... | ... | ... | ..... | ..... | .... | ..... | ..... | .... |
| 2 | Lower | ..... | ..... | ... | ... | ..... | ..... | .... | ..... | ..... | .... |
| 3 | Upper | ..... | ..... | ... | ... | ..... | ..... | .... | ..... | ..... | .... |
| 3 | Lower | ..... | ..... | ... | ... | ..... | ..... | .... | ..... | ..... | .... |
| 4 | Upper | ..... | ..... | ... | ... | ..... | ..... | .... | ..... | ..... | .... |
| 4 | Lower | 4 5/8 | 5 | + 3/8 | 220 | 5 | 00 | 00 | 5 1/8 | + 1/8 | 73 |
| 5 | Upper | 4 5/8 | 5 | + 3/8 | 220 | 5 | 00 | 00 | 5 1/8 | + 1/8 | 73 |
| 5 | Lower | 4 | 4 5/8 | + 5/8 | 366 | 5 1/8 | + 4/8 | 293 | 6 | + 7/8 | 513 |
| 6 | Upper | 4 | 4 5/8 | + 5/8 | 366 | 5 1/8 | + 4/8 | 293 | 6 | + 7/8 | 513 |
| 6 | Lower | 3 3/8 | 4 1/8 | + 6/8 | 439 | 5 3/8 | + 1 2/8 | 732 | 7 4/8 | + 2 1/8 | 1245 |
| 7 | Upper | 3 3/8 | 4 1/8 | + 6/8 | 439 | 5 3/8 | + 1 2/8 | 732 | 7 4/8 | + 2 1/8 | 1245 |
| 7 | Lower | 3 1/8 | 3 3/8 | + 2/8 | 146 | 5 2/8 | + 1 7/8 | 1099 | 6 2/8 | + 1 | 586 |
| 8 | Upper | 3 1/8 | 3 3/8 | + 2/8 | 146 | 5 2/8 | + 1 7/8 | 1099 | 6 2/8 | + 1 | 586 |
| 8 | Lower | 3 4/8 | 3 4/8 | ... | ... | ..... | ..... | .... | 5 2/8 | ..... | .... |
| 9 | Upper | 3 4/8 | 3 4/8 | ... | ... | ..... | ..... | .... | 5 2/8 | ..... | .... |
| 9 | Lower | 5 2/8 | 5 2/8 | ... | ... | ..... | ..... | .... | ..... | ..... | .... |

This table demonstrates the impossibility that an avulsion could have occurred at this point in the river, between the States of Louisiana and Mississippi, between the years 1824 and 1882, for the following reasons:

The river never traveled west. East of Willow Point the original sections are still there.

The evidence of complainant shows that the river at this point was at all times approximately the same width (R., 144, 155, 156, 157).

Defendant in its brief, on page —, adopts as true the contention of complainant that the river at this point maintained its width, Mr. Marshall admitted same (R., 181).

Assuming that the surveys show it to have been about two-thirds of a mile, that would be, say, 1,200 yards wide at this point. It was narrow and deep (R., 157).

The 1866 survey shows that from 1824 to 1866 the river had only extended eastward at Willow Point, at the place of the greatest extension, which was the lower line of Section 6, 439 yards, or one-fourth of a mile. Island 98, or Tullos Island, then opposite the point, was a distance, say, of 1,100 yards from the Louisiana shore. Captain Reed thought across from the Tennessee Bar was three-quarters of a mile (R., 118-119).

As the river, until 1866, had only extended eastwardly 439 yards, from the acknowledged bank line of Louisiana, of 1824, for there to have been an avulsion, subsequent to 1824 and prior to 1866, through

Mississippi territory, the river must have extended eastwardly at this point, more than its width, or more than 1,100 yards; but as it had only extended east one-fourth of a mile it is an impossibility for there to have been an avulsion at this point prior to 1866.

It necessarily follows that the Louisiana bank line of 1866 was Louisiana territory.

From 1866 to 1870, as shown by the surveys and the above table, the river at this point had only extended, in its widest place, 1,099 yards, and this being less than the width of the river, it is a physical impossibility, during said period, for there to have been an avulsion in the river at this point through Mississippi territory. An island would not form *east* of the center of the river and *west* of the channel toward the concave bank. Had such island formed, as the channel moved east the river would have wiped it out and passed over such island.

Therefore the accessions to the Louisiana bank line up to 1870 would necessarily be Louisiana territory.

From 1870 to 1882, as shown by the surveys and the above table, the river at this point had only extended in its widest place 1,245 yards, or only about 145 yards more than the width of the river, even if in fact it was more than the width of the river at all. If between these dates there had been an avulsion in the Mississippi River at this point through Mississippi territory the strip left of Mississippi territory could not have been more than 145 yards between the two channels, even if the accretions had stopped on the Louisiana side as the Mississippi shore receded.

Complainant assumes that such an avulsion as the defendant suggests could not have happened, and never did happen in the history of the river.

Mississippi could not have acquired territory here through the formation of an island for reasons just given in regard to the period from 1866 to 1870.

Even if such could happen, the evidence makes it clear it did not happen in this case.

The evidence of all the witnesses and the surveys show that the caving was much more rapid after 1882 than before, and it would follow that from 1870 until 1882 the change was gradual, and as the Mississippi shore receded the Louisiana shore advanced, and as the river between those periods did not move further east than shown on the table at any time prior to 1882, it had not moved that far east.

Mr. Beard was familiar with Willow Point as far back as 1876. This was only four years after the survey of 1870. He testified he had been familiar with Willow Point for fifty years. Had there been an avulsion of the river he would have known it. Every one in the locality would have known it and talked about it. He testified that the channel was east of Newman's Towhead prior to the avulsion of 1912-1913. The river from 1870 to the time Mr. Beard knew it in 1876 would not have moved 700 yards to the east, as the evidence shows that its movement to the east was continuous and gradual.

For the sake of argument, if there had been an avulsion in 1870, after the survey, the channel could not have remained west of Tullos Island until after

1882, and all the witnesses and surveys show this to have been the fact.

There was an island at or near this point, Hopkin's Island, in 1870, but the surveys show this to have been Louisiana territory, and the main channel of navigation was east of this island. The boundary line was necessarily east of this island. The boundary line was therefore closer to the Mississippi shore than to the Louisiana shore.

The evidence showing that to the east of Willow Point there has never been any caving, and that the channel was around Albemarle Bend next to the Mississippi shore, it is exceedingly improbable that an island would form in the channel where the current was strongest.

There is neither evidence nor contention that any of the lower part of Willow Point ever caved away, or that the river at that part was ever west of the line of 1824. Willow Point always being *convex*, and the Mississippi shore opposite always concave, is a physical fact strongly persuasive that at no time did the Louisiana shore line at this point ever recede westward of the 1824 bank line, but that the accessions until the avulsions of 1912-1913 were to the Louisiana shore and the recession opposite on the Mississippi shore.

These Exhibits G. H, I, and J, reproduced from maps of original survey, reduced to a scale of one to twenty thousand, and which maps are superimposed for purposes of comparison, enable us by taking said scale and making calculations of distances in the pro-

portion that an inch on the map bears to a mile on the surface of the earth to determine at different times the approximate width of the river and the amount of accretion to the Louisiana shore between given dates. The approximate width of the Mississippi River between shore lines at different periods is about two-thirds of a mile. The river remained at practically the same width regardless of changes in the channel resulting from accretions on one side and caving on the other. Captain West, of the River Commission, in his testimony (R., 155) says:

> "By following the Charts, as the Mississippi shore receded by caving and the Louisiana shore followed it up by accretions, the river remained at approximately the same width whatever position it had. For instance, you take the Chart 1882 of the Mississippi River Commission, it shows the accretions out beyond the shore line of the Louisiana shore line of 1824, and beyond the shore line of 1866. Just a gradual building out. That is the characteristic of the Mississippi River throughout the lower valley, that it maintains about the same width all the way."

**St. Francis Chute.**

It is shown by witnesses that there was a place on the Louisiana side which though not shown on the maps was called by local people St. Francis Chute.

Captain Prince was asked by defendant's counsel if he knew a point where the water now *backs up in the old channel of 1823,* in times of high water. He answered "Yes" (R., 39).

The question and answer indicates that even in high water the river did not come through this chute, but that only the lower end of this was open, into which the water, when high, backed up.

This same place is mentioned by Mr. Ernest Newman in R., 55, 56, 58, 59, and 60. He said there was just a kind of a slough there that runs *up to Hendersons,* and it had been there ever since he could remember. That it had never been any channel—*just a little chute behind the bar.*

The witness said in another place that there was a little narrow chute that *comes down along the main shore,* and that the current in high water passed through there and comes over 7 or 8 miles around the bend.

But the testimony also shows that the Newman's old home was built on the bar about 100 yards in front of the mainland, and that there is a depression now at the place where the old bank was—*what bank is left there* (R., 67-51-87.)

The witness of defendant, Townes, said St. Francis Lake, or chute, in 1900 was a little lake on the west side of the river right *down* from Mrs. Newman's place. *That it was the main Mississippi River when he went there, and was named St. Francis Chute years later, and that it filled up* (R., 233).

This witness was 59 years old when this testimony was taken (R., 220), which was in December, 1926 (R., 162). He was, therefore, born in 1867. He went to Chotard in 1880, which is on the Mississippi shore op-

posite the property in question (R., 220). It is, therefore, certain he knew nothing about the locality prior to 1880. It is certain St. Francis Chute could not have been the channel in 1880, and that at the time of the survey by the Mississippi River Commission in 1882 had filled up as indicated. Sheet 17 of the Mississippi River Commission charts shows in 1882 heavy timber growing where Townes testifies was at that time the channel of the Mississippi River.

This witness is contradicted by the surveys of 1866 and 1870, as shown in the table hereinabove set out, and by the survey of 1882, and by the following witnesses, to wit: I. B. Beard, the Newmans, E. T. Purnell, and Capt. Jos. V. De Lahunt.

Mr. Beard, who was born in 1866, and recollected Willow Point for 50 years (since 1876), and was a brother-in-law of the owner, Walter A. Newman, and visited said place quite often (R., 86), said that at his earliest recollection the Willow Point bar had extended out from the mainland one and one-half or two miles; that the bar started right where it joined the bank (R., 87).

The testimony of the Newman boys shows that the Newman's old home was on the bar 100 yards in front of the main bank (R., 67-51).

Mr. Purnell was born in 1866 (R., 259), moved to the Purnell plantation, on the Mississippi River opposite and directly east of Island 98, in 1880 (R., 260). He remained at this place from 1880 to 1897; that he hunted on Island 98 hundreds of times; that when he first knew the Island the *main channel* of the river was

*immediately* west of Island 98 (R., 261). It could not, therefore, have been through the little chute mentioned. He further said there was a towhead building up on the Louisiana side (R., 265).

Captain De Lahunt was 70 years old (R., 288). He was licensed as a pilot on the Mississippi River in 1879 or 1880 (R., 289); made three daylight trips per week (R., 290), passing up and down the stretch of the river in controversy (R., 291). The channel was west of Island 98 with the current *against the island* (R., 292-293).

Therefore, the testimony of the defendant's witness Townes that when he first went to the locality in question, which was in 1880, that the little chute which is shown to have been south of Willow Point, running up to Hendersons, was the main channel of the Mississippi River, is clearly erroneous.

The witness for defendant, Mr. Etna J. Albrittain, who is claiming part of the land in controversy, made his first trip to the vicinity in question to look it over in July, 1912. (This was after the avulsion in the high water of 1912.) The steamboat which he was on left (what he pleased to call Tullos Island, or Island 98) the island to the left of us. At this time he went over the island part of the land. At this time the water was flowing on both sides.

From this testimony he did not visit the vicinity of what is locally called St. Francis Chute at this time.

The next date he could recollect as having visited this property was in the fall of 1923 (R., 242).

This witness further testified that along the old channel of 1923 (1824) *down* next to Hendersons the water was about 200 yards wide; that Chart 47 shows the channel about 10 feet lower than the land on either side. He said they thought by going up the old river bed they could surround the water that was *backed* into the channel, but could not, as they found water all the way to where it went into the river at the north (R., 246-245).

However, the witness also says: "Well, after a distance of *a mile* north of Hendersons, *there was no discernible bank line on the west* (R., 246). Comment: The first place below Willow Point is just north of the plantation formerly owned by Mrs. M. G. Foster, and called "Pecan Grove Plantation." This place was more than one mile across, and "Hendersons" is the next place below Pecan Grove, so that by the time the witness reached Willow Point he found *no discernible bank line.*

Mr. Beard, being asked as to the property south of Willow Point, said he though it was the Bell Plantation belonging to a Mr. Foster. (This was not Mr. R. E. Foster who testified.) (R., 92.) He got the name of the owner correct, but gave the plantation the wrong name, as it was Pecan Grove. (It seems that Pecan Grove was sometimes called Belle Plantation)

The entire testimony, maps and surveys show that if there was any depression left where Willow Point bar joined the mainland it was very small.

By examining Complainant's Exhibit A, being township survey of T. 19 N., R. 13 and 14, showing the original bank line of Louisiana, as shown by the Gov-

ernment land survey of 1824, it will be seen that the course of the river for several miles just north of the property in controversy is just a little south of east, the course being *almost east,* and that it turned Willow Point in a sharp angle south. This necessarily caused the current to flow against the western part of Tullos Island, or Island 98.

Complainant's Exhibit G, showing the Louisiana bank line of 1866, does not materially change the condition in this regard existing in 1824, except that some caving had taken place along said north line, but very little.

By an examination of the various charts of the survey of 1882 it will be seen that the general course of the river north of Willow Point was still almost east, with a slight trend toward the north, and that it had cut away most of Tullos Island, particularly the southwestern part, and that the channel then flowed against the southwestern part of the island.

In addition to the surveys, Mr. Beard says there was caving on the northern part of Willow Point Plantation (R., 89-93-94); that the channel at this point ran east (R., 90). It had been caving on the north side ever since he could remember. *It was a gradual caving* (R., 94).

This testimony is referred to to show that for the river between 1824 and 1882 to have made an avulsion through the little chute, locally called St. Francis, or at any place through where Willow Point or bar now is, the river must have made such cut-off at a right angle to its course, and such has probably never happened

in the history of the river. However, as the river never went west of the Louisiana bank line of 1824, and as the surveys of 1866, 1870, and 1882 show that the greatest distance the river had moved east from the time of one survey to the time of the next was only 1,245 yards, being less than three-fourths of a mile, and *if not less than the width of the river, approximately its width*, conclusively demonstrated that between said periods there could not have been an avulsion of the river at this point through Mississippi territory, so as to throw a portion of Mississippi territory west of the river, onto which the land in question could have built.

It is shown that the channel was on the Mississippi side east of the land in controversy, and that islands and bars only build where the current slackens so that silt may deposit. Therefore, the claim of the State of Mississippi that complainant has failed to show that such an avulsion had not taken place is not well founded, and this point must be decided against it.

Defendant has made the point that complainant must bring itself within the rule governing riparion proprietors, and that the complainant cannot recover, unless it has shown that the accretions attached to the bank.

Defendant is mistaken in this contention. The State owns the channel of the stream.

It is immaterial whether the formations of land attached to the bank as accretion or formed west of the center of the channel as a sand bar or island, as all islands towheads or sand bars which form in the river

west of the channel belong to the State of Louisiana, as well as accretions that may attach to them.

Since the starting date, 1823, is over a hundred years ago, and since 1882 is over forty-five years ago, it is manifestly impossible to furnish the testimony of eye-witnesses to the changes which took place on the Louisiana shore line between 1923 and about 1876, the date when complainant's earliest witness was familiar with the locality; and since between 1824 and 1866 there is no record of any surveys of the Louisiana shore line in the vicinity of Willow Point to which the accretion claimed is attached, it is likewise manifestly impossible to furnish documentary evidence showing same, prior to the survey of 1866. However, by comparing the surveys of 1824 and 1866, it is shown that the change in the river east of Willow Point, between the dates of said surveys, was only 439 yards, in an easterly direction.

A careful examination and comparison of the lines as established by surveys in 1824, in 1866, in 1870, and in 1882 enables us to calculate and show by comparison and deduction that the easterly extension of the Louisiana shore line from Willow Point toward the Mississippi shore was so gradual as absolutely to negative the suggestion of the State of Mississippi that at some unknown and unrecorded time subsequent to 1824 there had been an avulsion whereby Mississippi territory was thrown west of the channel, and with the accretions formed thereto was Mississippi property and is the property in dispute.

A further comparative examination of the various maps and charts will show that the accretion claimed begins about the dividing line between Sections 4 and 5 and ends about with the dividing line between Sections 7 and 8. There is no accretion whatever to said Sections 1, 2, and 3, and there is no controversy as to the ownership of accretions, if any, attached to said Sections 4 to 9. In superimposing upon his blue prints Exhibits G, H, I, and J, the shore line of the survey of 1866, Capt. Chas. West, of the Mississippi River Commission (a witness for complainant), shows only so much of the 1866 shore line as affects the land in controversy. On one of said blue prints there is likewise superimposed the shore line as ascertained by the survey of 1870.

Complainant, therefore, contends that the first defense has failed.

**Answering Defendant's Second Contention.**

That if complainant has established that the accretions originally attached to the Louisiana bank, and that said shore line has been progressively added thereto by accretions until 1882 that complainant must fail because defendant's proof tends to show *that subsequent to the year 1882* the Mississippi River above and to the west of Willow Point cut into the Louisiana shore, deflecting the current from a southeasterly to a northeasterly direction; that because of this deflection in its course, the river cut around the head of and to the north and east of what was left of Tullos Island,

scouring out the old chute between the island and the Mississippi shore, and making a new channel there; that the old bed of the river filled up so that Tullos Island became attached to the Louisiana shore; that the river continued to cave the Mississippi shore, adding to the island by accretion until the year 1912-1913, when it suddenly abandoned its new channel and went back to the old 1882 channel, leaving Tullos Island again and in truth an island, but greatly enlarged by the accretions added thereto.

This contention of defendant is also disputed by complainant, complainant contending that Tullos Island, or Island 98, and any adjacent islands were washed away by the river in 1894, or prior thereto, and not a vestige of Tullos Island, or Island 98, or any other island adjacent in the disputed territory, was left remaining in that stretch of the river; that this has been established by the evidence.

Defendant contends that what complainant calls Newman's Towhead is in fact Tullos Island, or Island 98, which was Mississippi territory in 1923, and remained Mississippi territory. See defendant's answer, paragraph 5, subparagraph 5.

The determination of this question will determine whether defendant can make good on its second contention.

If, in reality, there was a bar on the Louisiana side of the channel existing in 1882, at the same time that Tullos Island existed in Mississippi, and Tullos Island, or any island of the State of Mississippi adjacent, within the territory in dispute, caved away, and

Newman's Towhead, prior to the avulsion of 1912-1913, occupied a large part of the position where Tullos Island, or Island 98, had been in 1823 and 1882, then complainant's contention must be held good, and the territory in dispute awarded to the State of Louisiana.

Before going minutely into the discussion, an error which complainant's counsel fell into with regard to the elevations, as shown by the survey of 1894 between the main banks of the river, will be considered.

**Error of Complainant's Counsel as to Captain Marshall's Testimony Made in the Original Brief**

Capt. Chas. H. West, a member of the Mississippi River Commission, had stated as follows (R., 151):

> "The survey of 1894 did not take in the topography. It only took in the change in the position of the river alone, and that survey was platted on the charts of the 1882 survey."

On R., 149, Captain West further said the survey of 1882 included

> "the shore lines—two banks of the river. It included the topography as it existed at the time of the survey out also about one mile from either side of the river, etc."

Counsel for complainant concluded from this that Captain Marshall had fallen into error in giving elevations between the main banks of the river as shown by the survey of 1894; and on page 67 of its brief complainant said:

> "Certainly these deductions of Captain Marshall, based on the errors of fact, and ignorance of what the survey of 1894 showed, cannot overthrow the testimony of the eye witnesses to the fact that Island 98 entirely disappeared, especially when such testimony is shown to be true by the survey of the Mississippi River Commission of 1894."

It now appears that it was the ignorance of complainant's counsel and not that of Captain Marshall as to what the survey of 1894 showed in regard to elevations between the bank lines.

Counsel for complainant assumed, as Captain West had said, that the survey of 1894 did not take the topography, but that the survey was superimposed on the chart of 1882, that the elevations referred to by Captain Marshall were those of 1882, on which the survey of 1894 was superimposed.

In this counsel were wrong and admit our error, and regret that it occurred.

We only received a typewritten copy of defendant's brief in the afternoon of Saturday, September 15, 1928, in which defendant very astutely and forcibly calls the attention of the Court to the above error, whereupon complainant's counsel at once arranged a trip to Greenville, Miss., to interview Captain West in regard thereto, so as to definitely determine whether they had made the mistake alleged by defendant.

We know that the statement of Captain West in regard to this matter *can in no manner* be received as evidence in the case, but is only in the nature of a

statement from counsel, and we do not insert the statement of Captain West to be taken as evidence, but we asked him questions in regard to the alleged error, and as to what effect such error would have on the conclusions of complainant's counsel. These were taken down and answered in writing. In order to get this statement exactly as made we here insert it:

> "Q. Captain West, you state in your testimony, R., p. 151, as follows:
>
> "'The survey of 1894 did not take in the topography. It only took in the change in the position of the river alone and that survey was plotted on the chart of the 1882 survey.'
>
> "Counsel for complainant (R., 151) assumed from the above statement that no topography or elevation at all was shown on the 1894 survey, not even between the main bank lines. Were counsel for the complainant correct, and, if not, how far were they incorrect in their understanding of your testimony?
>
> "A. You are not correct in assuming that no elevations were taken at the time of the 1894 survey. The 1894 survey was what is known as a low-water and hydrographic survey and did not extend beyond the bank lines, its purpose being to show the position of the river at that time. There were elevations taken to show the depths of water and elevations between the bank lines as is the case in all hydrographic surveys, but no typography beyond the banks of the river was taken. The elevations were for the purpose of not only showing the depth of the water in the channel but the shape and heights of the bars between the bank lines.
>
> "Q. If the elevations existed in 1894, as

claimed by Captain Marshall and shown on Exhibit 4 (A), (B), and (C), is it possible for said elevations to have been on either Tullos Island, or Island 98, or other islands or said bars adjacent thereto in 1882 on the Mississippi side of the river?

"A. No. By the time of the 1894 survey Tullos Island, or Island 98, and also the islands or bars adjacent thereto had entirely disappeared, because as the river swung eastward these islands were caved away and the channel of the river had occupied the area where they had existed.

"Q. Then if said elevations existed in 1894, were they not of land then necessarily on the Louisiana side of the river known as Newman's Towhead?

"A. Yes. Any elevations existing in 1894 on the west side of the channel of the river and between that and where the Mississippi shore had been in 1882-83 was the surface of deposits or accretions that had formed on the point on the west side of the river as the channel moved eastward by caving. It is quite possible that some of these deposits had built up to as high or even a higher elevation than had been the original surface of Tullos Island. As the concave bank on the east or Mississippi side receded by caving, the point opposite on the Louisiana side built out by accretions or deposits. The height of such deposit increases as flood heights increase. I have often heard this point on the Louisiana side called Newman's Towhead.

"Q. Captain Marshall said that he was on Tullos Island in 1890 and there were two islands with a chute running between the two. While he was there a mail boat passed up the chute and an anchor line boat passed through the main channel on the western side of both islands. There were trees on both islands, mostly cottonwoods and willows. There was a swift current between the two islands and a channel to the east of both islands, possibly 100 feet wide. Does such a statement from Captain Marshall in any way contradict the facts as shown by the Mississippi River Commission survey of 1894, that both islands had entirely washed away?

"A. It does not. A strip along the east side of the island did exist in 1890, but between 1890 and 1894 the Mississippi shore receded between 300 and 400 feet a year, or a total recession during the four years of about 1,500 feet. In 1894 the channel of the river occupied the position where that portion of the island had been in 1890.

"By CHAS. H. WEST.

"Greenville, Miss., Sept. 19, 1928."

However, the fact that complainant's counsel made this error can in no way affect the result of the case if we are able to show to the Court that complainant has established every material allegation of the bill of complaint.

Referring to Captain Marshall's testimony, Exhibit 4 A, B, C, giving the detail tracing of the United States Engineers' survey of 1894, he lays stress on the fact

that, in the upper right hand corner of the sheet, contour lines are shown, indicating a height of one hundred and ten (110) feet, Memphis datum, and that on said place is marked "Willows."

In his Exhibit 4-D, he has shown these contours, but in place of the word "Willows" he has substituted the word "Timber," which is an apparent alteration of the work sheet from which Defendant's Exhibit 4-D is said to be made up. This would be misleading, for the reason that "Timber" conveys the idea of large trees. Referring again to Exhibit 4 A, B, C, in other locations on the same work sheet, appear the words "Switch Willows," "Willows," and "Large Willows." The words "Large Willows" will appear on what is seemingly the older or higher bank. Had the timber, on the high points now being discussed, been large timber, the engineers would presumably have so marked it, as they did in other places. On what is undoubtedly the old bank, being the shore line of 1882, timber is described as "Willow" and "Cottonwood," indicating that the word "Willows" is used usually for the smaller or younger timber growing on the bars. This interpretation is further sustained by Chart 47 (Complainant's Exhibit F), in evidence where the heavier shading, indicating large timber, is marked "Willow" and the light shading, indicating small timber, is marked "Willows." Chart 45 of the Mississippi River Commission, being Complainant's Exhibit E. E., will show Tullos Island as being covered with oak, cottonwood and hackberry and shown by the shading to be large timber. If defendant's

contention were true that the high ground referred to and claimed by him to have been a portion of Tullos Island that had not caved away, this work sheet would doubtless have shown in place of the word "Willow" the words "Oak," "Cottonwood," and "Hackberry," and would have shown it to be large timber, instead of small timber, as indicated by the use of the word "Willows."

The above facts indicate that Captain Marshall's deduction is wrong, and that what was once "Tullos Island," or Island 98, was completely washed away, the channel of the river having swept completely over what was the location of the island and eastward thereof; that the sand bar from Louisiana shore continued to build out and build up high toward the outer end, and that "Willows" did spring up on this higher ground, and, as they grew and the current of subsequent high waters covered this point, the slackening current, because of the willows, caused silt to be further deposited and the process of making higher ground was continued thereby, and that said location is what is shown on Chart 47 as Newman's Towhead, being Exhibit F of complainant, and is not Island 98.

It may be further noted that the high ground claimed on Exhibit 4-D to have been Tullos Island in 1882 extends, according to said exhibit, about a third of the way across what said exhibit shows to have been the channel of the river in 1882 and across the thalweg at that time. This deduction from the survey and contour lines of 1894 would place a portion of the land that is claimed by defendant to be Island 98 continu-

ously since 1822 to be west of where said island is shown by his exhibit to have been and across where the thalweg of the river was in 1882.

Captain Marshall states (R., 173-174) (referring to Exhibit 4):

> "The fact that the island elevation shows a reading of 110, and the water survey on the shore line shows a reading of 60 feet, is absolute proof of the fact that the island was fifty feet above the water surface at the time of the survey, with trees growing on top of it. I can state of my own personal knowledge that in 1890, four years before the survey was made, that Island 98, or Tullos Island, the island above it, had not been washed away, but was still in existence. Of course, everybody knows that an island cannot be washed away and then four years later be built back with big trees growing on it, as shown by this survey."

This testimony is confusing and is liable to mislead. While Captain Marshall shows some of Tullos Island had not entirely caved away in 1890, he does not show what part remained there at that time. He said at the time the chute between the island and the Mississippi shore was possibly 100 feet wide (R., 173). The caving was therefore on the western side and not on the eastern side of the island. At this time, 1890, there could have been a very small strip of the island left in sections 21 and 28, while more than 1¾ miles of the southwestern part, and probably more than 1 mile of the western and northwestern part, of what had been the

island in 1882, had disappeared and the place where it had been was then covered by the river, and accretions from Willow Point Sand Bar and Towhead, which had extended across from the Louisiana shore.

The elevation of 110 which Mr. Marshall speaks of was shown on the work sheets of the survey of 1894, which was four years later than when he last saw the island, at a time when the survey of 1894 shows, that the part of the island which was left in 1890 was then either in the channel or covered by accretions from Louisiana. So that the 110 elevation, shown by the work sheet of the survey of 1894 as being in the same location as where a part of Tullos Island had once been, was Louisiana territory, as the same survey from which Mr. Marshall got his data 1894 show such to be the fact Captain Marshall's theoretical conclusion that Island 98 did not entirely wash away is apparently based (1) on the elevations shown by surveys according to exhibits 4 A, B, and C. Let us analyze his theory and conclusion. He loses sight of the fact that since even before 1890, with the constantly increasing volume of water which the lower Mississippi has to carry (due to the clearing of lands in northern and western States) for the protection of alluvial lands in the lower valley vast levees have been built and yearly raised in height. That these levees have been built many feet in height above the mainland. That almost annually the river confined between these levees rises to the height of the levees and above the level of the mainland (and frequently flows over the levees). He loses sight of the fact, which is of

common knowledge (as well as being testified to), that islands and towheads formed by accretion speedily rise to a height or level or *above the level* of the land on the main shore. This is an explanation of the high levels shown in his exhibits which negatives the conclusion or deduction or theory advanced by him that the high bar, or Newman's Towhead, must be the remains of Island 98.

Captain Prince, an old river captain, testifying as to the building up of bars and towheads in the river where willows sprung up says (R., 26-27):

> "Q. As these willows grew what changes took place with reference to the bar where the cottonwood and willows sprung up with reference to the alluvium deposit?
>
> "A. Trees grew there, and where trees grew the *land built up higher, higher than the mainland.*"

Captain Reed, another old river captain, testifying in reference to Newman's Towhead in the year 1900 (R., 125), says:

> "Q. How high was the timber at that time (1900)?
>
> "A. I judge that some was thirty-five or forty feet high.
>
> "Q. How high was that above the surface of the water?
>
> "A. You will have to tell me what the stage of the water was.
>
> "Q. Well in ordinary stage.
>
> "A. The towhead as *about as high as the mainland* over next to where I told you I saw

> the old house. The towhead was just about as high as the mainland."

So the deduction of Captain Marshall that because a map of survey shows a bar or an island or a towhead to have a high elevation that, *ipso facto,* it is land of old formation, or in this particular case indicates that Island 98 did not entirely cave away is a *non sequitur*—and at most only his personal opinion.

Captain Marshall said (R., 175):

> "In 1890 during the high water I was in charge of the levees from R. E. Foster's place down to the end of the Mississippi River District at Brunswick." * * * "One morning while there I went out with Jack Chilton to meet the mail boat which came up the chute on the eastern side of Tullos or Island 98." * * * "There were two islands, with the chute running between the two. While we were there and the mail boat passed up the *chute side* an anchor line boat passed down the main channel on the western side of both islands. There were trees growing on both the islands, large cottonwood and willows. There was a swift current flowing down between the two islands and a channel to the *east* of both islands. Without being able to say how wide it was, it was possibly 100 feet wide, enough for the mailboat."

Now this was in 1890. Note that some of Island 98 still existed. Note that the width of the chute between what then remained of Island 98 and the main shore of Mississippi *was possibly 100 feet wide,* only.

Captain Marshall's theory deducted from surveys,

was that the island never all caved away. Captain West said it all disappeared, and he was there three years later than Captain Marshall. The 1894 survey of the Mississippi River Commission sustained Captain West's view, and the eye witnesses showed that Captain West was correct.

Mr. E. T. Purnell, who from 1880 to 1897 lived on the main land directly across the chute from Island 98, was familiar with it, hunted on it hundreds of times, and testified (R., 263):

> "Q. Was the channel at any time between your farthest recollection of that place in 1867 and 1897, between the Island and the Mississippi shore?
>
> "A. No, sir.
>
> "Q. Do you know whether or not the island ever entirely disappeared, Mr. Purnell?
>
> "A. Yes, sir.
>
> "Q. Do you know when it disappeared?
>
> "A. Either in 1894 or 1895, during the high water of one of those two years, during high water. But as I say, I am not positive which." (He later said it disappeared in 1893, 1894, or 1895, R., 282.)
>
> "Q. Did you say it disappeared or not?
>
> "A. It did (R., 264).
>
> "Q. Then how did it disappear?
>
> "A. It washed out entirely.
>
> "Q. There was not a vestige of it left of any sort?
>
> "A. No, sir.
>
> "Q. Up to the time of the disappearance of that island, where was the main channel of the river?
>
> "A. *It was to the west of the island.*"

We submit to the Court, which is the better evidence as to whether the island disappeared, the deduction of Captain Marshall based upon theory, or the positive testimony of Mr. Purnell, based upon personal knowledge?

We now direct the attention of the Court to the testimony of witnesses for Louisiana and Mississippi respectively, as to the entire disappearance of Island 98, or Tullos Island.

To rebut the testimony of complainant, the defendant offered the testimony of two negro roustabouts, Lawrence Towns and William Miller, who served on boats on which Captain De Lahunt was pilot.

An examination of the testimony of Lawrence Towns will at once convince the Court that they cannot rely upon it.

William Miller's testimony was clearer. But when he said that Tullos Island did not entirely disappear, he was at least in error.

Mr. R. E. Foster does not seem to have known much about the island in later years.

The witnesses best qualified to testify to changes in the Mississippi River itself are steamboat captains and pilots, whose business it was to study the river, and who went up and down the river between Vicksburg and Greenville, constantly passing the place in controversy.

We urge the importance of the testimony of Louisiana's witnesses, Capt. George Prince, a veteran steamboat owner; of Capt. William H. Reed, afterwards sheriff of Adams County, and of Captain De Lahunt, a veteran pilot, now in the service of the U. S.

Engineers' Office, at Memphis. We do not deem it necessary to quote their statements, but refer the Court to same as contained in the record. These gentlemen, as captains and pilots on steamboats, in the performance of their duties of necessity closely observed conditions and changes in the channel and along the shores of the Mississippi River. There is no confusion or ambiguity in their testimony. A careful reading of their testimony establishes beyond doubt that Island 98, or Tullos Island, as mentioned in bill of complaint and shown on maps and as defined in defendant's brief, caved away and entirely disappeared as the Mississippi River moved easterly.

The testimony of Mr. E. H. Purnell, whose family owned the Auraton, or Purnell Plantation, just across the chute from Island 98, is so clear, concise and emphatic, and based on such intimate personal knowledge, that it alone should be sufficient to satisfy the Court of the total disappearance of Island 98.

Mr. Hume was another witness for defendant. He first went to Chotard's only the last of October, 1896, and remained till January, 1907 (R., 191). This was after the Island 98 had entirely disappeared, according to the preponderance of testimony. Then how could he testify regarding it if it had disappeared before he went there? As a matter of fact, his testimony shows that he was testifying with reference to Newman's Towhead, and when he says he was familiar with Island 98, he meant Newman's Towhead (R., 191).

> "Q. Were you familiar with the tract of land known as Island 98, or Tullos Island?

"A. Yes, sir.

"Q. When you went there in October, 1896, what was the situation with respect to Island 98, whether it was there or not, and how much, if any?

"A. Oh, yes, sir, there was *land there* all right enough, yes, sir.

"Q. Describe the water about that land.

"A. The water—the river was eating in on the Mississippi side, caving in on there, and the land, well of course,—well, the upper part of that land was *almost due west of Chotard Landing.*

"Q. Was that across the river?

"A. *Yes, sir.*

"Q. Now was it an island?

(Note the leading question.)

"A. Was it an island?

"Q. Yes, sir.

"A. *At that time we called it a bar.*"

(Comment: And a bar it was; it was Newman's Towhead, as established and shown by maps and testimony of witnesses. Now what is the testimony of Mr. Hume worth, a witness who had never been to the locality till October, 1896?)

The testimony of this witness is manifestly applicable only to the Newman's Towhead as it existed between 1896 and 1907. He had no knowledge of conditions prior to that date; and if (as we believe) the total disappearance of Island 98 before that date has been established, the rights of the State of Louisiana had become established and fixed before he ever appeared on the scene.

Manifestly, in order for defendant to sustain its theory as to the changes in the river and shore lines subsequent to 1882, it must rebut Complainant's proof that Island 98, or Tullos Island, as it existed in 1823, and as its boundaries are defined by the United States Surveys of Mississippi of that year, had, by erosion and caving, entirely disappeared; otherwise, the contention of the State of Louisiana is conclusive.

The State of Mississippi endeavors to negative the contention of the State of Louisiana by offering testimony of Capt. Horace Marshall and of several witnesses to prove that said original Island 98 did not entirely disappear.

We respectfully submit that the testimony of Captain Marshall is highly technical and theoretical and proves nothing unless his theoretical and technical deductions are accepted and the positive physical evidence of maps of the Mississippi River Commission surveys showing the gradual changes in the channel of the river, the gradual projection of the Louisiana shore by accretion, the gradual and final disappearance of Island 98 by caving, and the gradual caving and recession of the Mississippi main land shore by caving, is ignored and disregarded.

The evidence of maps of survey of the Mississippi River Commission of 1882 and subsequent years, and which are in evidence, need only to be carefully examined to sustain complainant's contention as to the changes which took place subsequent to 1882, at which time (1882) there was a clear river between the Louisi-

ana shore and what then remained of the original Island 98, or Tullos Island. We do not believe that these plain physical facts, shown by these surveys and maps, explained or interpreted by as imminent an authority as Capt. Chas. H. West, of the Mississippi River Commission, can be overthrown by the theoretical and technical deductions of Captain Marshall that Island 98 did not all disappear, especially so in view of the fact that the last time that he personally inspected the locality in question, about the year 1890 (R., 173), when Captain West had been there in 1893 (R., 156).

Let us now consider Captain Marshall's testimony as contained in the record:

*First.* Does Captain Marshall himself lose sight of the fact that, as shown in the survey of the Mississippi River Commission of 1882, that Island 98, or Tullos Island, embraced only a part of Section 21 and a small part of Section 28, T. 9, R. 8 W., Choctaw District, Mississippi; that this small part continued to cave, and that in 1890 there must have been a very small part left.

On page — of defendant's brief, we read:

> "Complainant's Exhibit M, Mississippi River Commission, Chart #45, Survey of 1882, shows that Tullos Island, or Island 98, was in existence at that time. This chart *also shows another island* located to the northwest of Island 98, *not named on the chart.*"

If it was another island, and it was, manifestly it could not properly be called or referred to in brief,

or otherwise, as upper "Island 98 or Tullos Island." There is no connection whatever between the two islands.

On same page of brief we read further:

> "Captain Marshall in his testimony refers to these *two islands* as Upper and Lower Tullos Island" (R., 171-175).

But exactly what does Captain Marshall say (R., 171)?

> "Exhibit 3, sheet 17 of the Mississippi River Commission. That shows there was another island on the Mississippi side of the Mississippi River, *Island No. 98, which is the same thing as Tullos Island*, the island above that, up stream on the Mississippi shore."

This does not call it Tullos Island, or Upper Tullos Island. The underscoring is ours. He says Island 98 is the same thing as Tullos Island (see chart); but does he say the other island is either Island 98 or Tullos Island, or any part of it?

Again (R., 175), referred to in defendant's brief, Captain Marshall says:

> "One morning while there, I went out with Jack Chilton to meet the mail boat which came up the chute, on the east side of Tullos, or Island 98, and landed against the levee and put off the mail for Jack Chilton. There *were two islands*, with the chute running between the two."

Again Captain Marshall does not say the Upper Island was Tullos Island. We can only determine what Captain Marshall means from what he says.

The testimony of Captain Marshall that Island 98, or Tullos Island, *did not* entirely disappear by caving into the river, is only his opinion, and theoretical deduction, and is contrary to the physical facts shown by the Mississippi River Commission maps, and is contradicted by the great weight of testimony showing the facts, and the physical facts which sustain the eye witnesses. Complainant has not contended that a small part of the northerly portion of the so-called "other island," north and west of Tullos Island, caved away, and does not claim that a portion of said so-called "other island" that failed to cave away, is Louisiana territory.

It is not Louisiana territory, is not near where Tullos Island was, nor where Newman's Towhead now is.

By an examination of sheet 17 of the charts of the Mississippi River Commission, being the survey of 1882, this "other island" is shown, and is of considerable length, the lower end being marked High Bar, the upper end not appearing to have any trees upon it.

By examining the survey of 1894, it will be seen that the southwestern corner of what had been this island had entirely caved away, and its location covered by the sand bar from Louisiana; that most of what had been this island was then in the channel of the river and the balance, the little part left, in the shape of a foot, covering a small part of the N. E. ¼ of Section 18 and the S. E. ¼ of Section 7, was in the

State of Mississippi and several miles distant from the property in controversy.

By examining sheet 17 of the Mississippi River Commission, showing the survey of 1894, it will be seen that this small remaining part of said "other island" is just south of a northern off-set in the levee on Magna Vista Plantation.

As stated, this was never Louisiana property, and is not claimed to be within its boundaries, and has no bearing on this litigation.

Counsel for defendant, in his brief, states as follows:

> "It will be recalled that the testimony is undisputed that the Islands were in existence in 1893, and yet one year later by the Survey of 1894, it is shown that there were then cottonwood and willow trees growing on the high ground. (The Islands.) It is inconceivable that if the island had completely washed away, as contended by the complainant, the Tow Head could have built back in that one year and have had growing upon it cottonwood and willow timber. The analysis of the undisputed facts reduces the contention of complainant to an absurdity."

The above deductions of counsel are incorrect because the above-quoted statement of what the testimony shows is incorrect. The survey of 1894, Defendant's Exhibit 4-D, shows high ground in Sections 17, northeast corner of 20, and west portion of 21, and east portion of 20, and shows this high ground to have timber on it. The work sheets of the surveyor's office, exhibits

4-A, B, C, has, where defendant has marked timber, the words, "Willows," indicating young growth. Furthermore, this high ground is not in the same location as Tullos Island was in 1882 and is more than three-fourths of a mile from what would have been the last part of Tullos Island to cave away. There is nothing in the testimony of witnesses to indicate where the last part of Tullos Island to cave away was with reference to the section lines; but all of the witnesses testify that the caving was from the western side of the island. Therefore, the eastern side of the island would naturally have been the last to disappear.

Defendant's Exhibit 6-F shows that in 1882 the chute between Island 98 and the bar above, erroneously called by counsel for defendant "Upper Tullos Island," occupied approximately the line of what he shows as the eastern part of the high ground shown in the survey of 1894, and said Exhibit 6-F shows that where he had marked "high ground" and "timber" on Exhibit 4-D, was bare sand bar on Exhibit 6-F.

All testimony, instead of being as counsel for defendant claims to the effect that this high ground in Sections 17, 20, and 21, was in the same place as Tullos Island in 1882, or at any time thereafter, is to the contrary and indicates that the last part of Tullos Island to cave away was the eastern portion farthest away from the high ground shown on the survey of 1894.

**Newman's Bar and Tullos Island.**

Is it true, as alleged by defendant, that what complainant calls Newman's Towhead is in fact Tullos

Island, as alleged by defendant in paragraph five, subparagraph five, of its answer?

Complainant contends such is not the fact.

The evidence clearly establishes that after the disappearance of Tullos Island, or Island 98, Newman's Towhead built up on Newman's, or Willow Point Bar, and that it became prominent about 1900 (R., —).

If Tullos Island and Newman's or Willow Point Bar existed at the same time, and were distinct properties, on opposite sides of the river, and Newman's Bar never disappeared, but still exists, then defendant's contention in this regard is unfounded.

1st. Did they both exist at the same time?

2nd. Were they on opposite sides of the river?

3rd. Did Newman's or Willow Point Bar ever wash away?

## I.

### Did Both Exist Simultaneously?

There is no dispute that Tullos Island existed in 1882. Captain Marshall says there was some of it there in 1890 (R., 173).

Newman's or Willow Point Bar existed at the same time.

Mr. Beard said at the earliest time he could recollect (1876) Newman's Bar (on Louisiana side) had extended out from the mainland a mile and a half or two miles, or something like that, and continued to grow each year afterwards (R., 87). A towhead subsequently formed on this bar, and grew year by year, *getting higher and higher.*

Ernest Newman could recollect as far back as 1893 (R., 66). Newman's Bar then extended about one and a half miles from the mainland (Louisiana) out to the water's edge. It was a continuous bar all the way out (R., 68). After the cut-off, 1912-1913, the island was called Willow Point Island. His place there was called Newman's Towhead—same thing. (That is, Newman's Towhead was a part of Willow Point.) (R., 69.) Mr. Purnell was born in 1866 (R., 259), and moved to a place opposite Tullos Island in 1880. He was on Willow Point Bar when he was a boy (R., 268). (The bar was higher toward the river.) As witness said boats could go through between the towhead and the mainland in high water, but in low water it was all connected with the mainland (Louisiana) (R., 269).

Captain Reed said the towhead *became prominent in 1900* (R., 103). From the record no other conclusion can be reached than that both Tullos Island and Newman's Bar, which bar was connected with the Willow Point Plantation of Walter R. Newman, existed at the same time.

## II.

### Were Tullos Island, or Island 98, and Newman's Bar on Opposite Sides of the River?

It is admitted that Tullos Island, or Island 98, was in the State of Mississippi.

Was Newman's Bar on the opposite side of the river from Tullos Island?

Let the witnesses answer:

Mr. I. B. Beard says this: "The main channel of the

Mississippi River was at all times prior to 1912, *east of Newman's Towhead* (R., 89).

Mr. Ernest Newman says the same (R., 52-53).

Mr. Geo. R. Newman says the same (R., 74).

Capt. George Prince says the same (R., 27).

Captain Reed says the Towhead was on Louisiana shore in 1900 (R., 104, 105).

Lawrence Towns shows Newman's Towhead west of the river prior to 1912 (R., 233).

The entire record shows beyond even the most fanciful doubt that Newman's Towhead, Newman's Bar, and Willow Point Plantation, which belonged to Mr. Newman and his transferees, were on the Louisiana side of the river prior to the cut-off of 1912-1913, and that the same and Tullos Island, or Island 98, were distinct properties.

### Did Newman's Towhead Wash Away?

The testimony of the following witnesses show that Newman's Towhead never washed away:

Capt. George Prince (R., 27-30).
Capt. W. H. Reed (R., 105-106-108-109).
I. B. Beard (R., 67-68-69-70).
Ernest Newman (R., 52).
Geo. R. Newman (R., 69).

We submit that there can be no doubt that Newman's Bar and Tullos Island existed at the same time, from prior to 1880 until about ~~1900~~ 1894; that they were distinct properties, one on one side of the river and

the other on the opposite side; that Newman's Bar, attached to Willow Point Plantation in Louisiana, was Louisiana territory. If Newman's Towhead existed prior to 1912 it could not have washed away, as it was on the convex bank of the river.

The surveys show that what was a bar attached to Willow Point extended and covered a large part of the place formerly occupied by Tullos Island, or Island 98, in 1823.

It is certain that the bar and towhead did not cave away prior to 1912. It is certain it did not do so afterwards, and therefore still exists.

If the property in litigation is Tullos Island, let the defendants tell the Court what became of Newman's Towhead.

### Did Tullos Island Wash Away?

It is admitted that Tullos Island, or Island 98, was Mississippi territory, and that at the time of the first Government land survey was composed of parts of Sections 20, 21, 28, nearly all of 29 and part of 30, in T. 9 N., R. 8 W., according to what is known as the land survey in the Choctaw Session (R., 135).

There is no dispute of the fact that in 1882, all of this island had washed away, except a part of Section 21, and a small part of 28.

The survey shows that between 1823 and 1882, Tullos Island, or Island 98, had caved away in its western side, more than one mile, and on the southern part more than one and three-quarters miles, and that the bar on the opposite side the river, at Willow Point, had advanced at about the same ratio.

This fact is easily determined by taking charts of the surveys of 1823 and 1882, reduced to a common scale, and taking tracings from the 1823 survey and placing same over the 1882 survey.

Such tracing will demonstrate that the caving was all along the western side of the island, but greater at the southern end. This is apparent to the naked eye, from an examination of the surveys. The lower end of the island in 1823 extended west nearly to the center of Section 30, while in 1882, the lower end was more than a quarter of a mile east of the ~~eastern~~ western section line of Section 28, a distance of at least one and three-quarters miles.

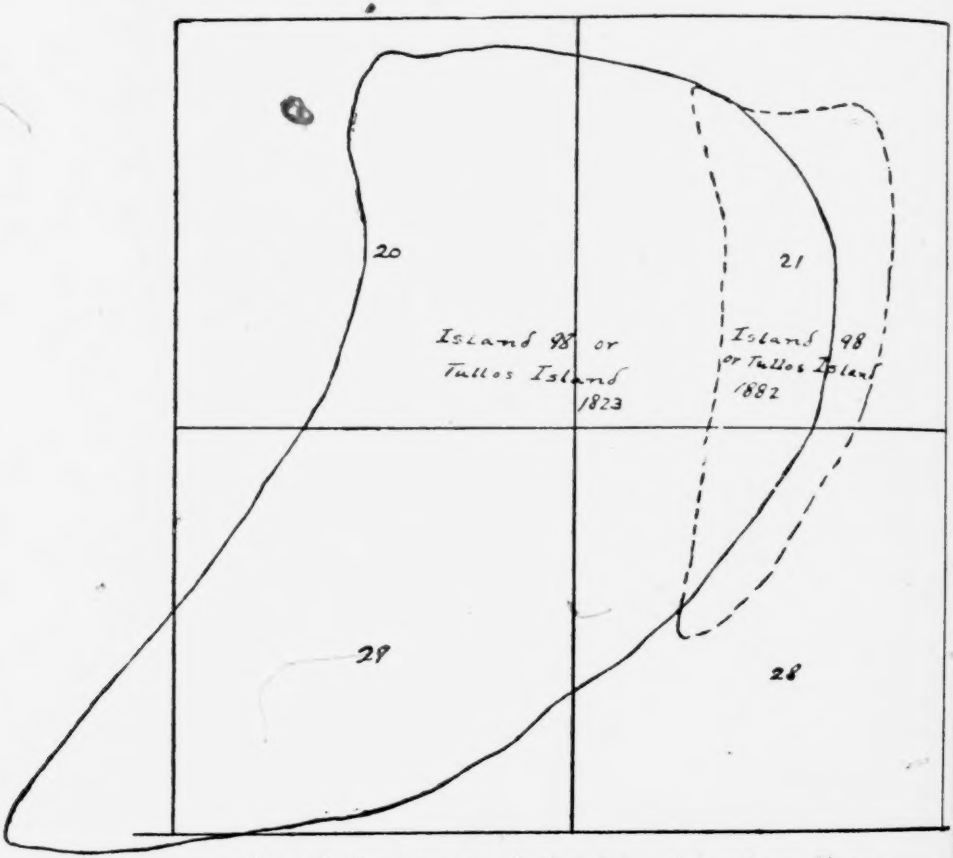
This physical fact is a mute, but unanswerable, argument to show that the current of the river was directed against the western side of the island, but more at the lower end.

This would follow, as the evidence shows that the river at this point maintained about the same width.

It follows that Newman's Bar, in 1882, necessarily occupied a part of the place formerly occupied by Tullos Island, and according to the evidence and surveys, the part so occupied was at least from one mile to one and a half miles, while less than one mile in width of Tullos Island was left. Even all of this was not the original island of 1823, as it had been added to on the eastern part by the partial filling up of the old chute between the island and the main bank. The surveys of 1823 and 1882 compared, show this. See illustration attached:

**Physical Facts to Show Tullos Island Entirely Washed Away.**

The surveys of 1823 and 1882 show that between those dates the current of the river was mostly against the southwestern part of the island, and that this part of the island had caved more than other parts, more




than a mile of that part of the island having disappeared. This is illustrated by the tracing herein above shown.

Until 1894 the caving north of Willow Point was gradual, and had been so for more than fifty years. This is shown by the testimony of I. B. Beard. He said the caving had been going on ever since he could recollect (R., 94), which was fifty years (R., 56).

It would follow that the current of the river which was against the southwestern part of Tullos Island in 1882, was gradually brought up more against the whole western side, and with this more direct force of the current against the island that it would cave more rapidly. The survey of 1894 shows that the northwest corner entirely disappeared first and at the date of this survey the bar from Louisiana had extended over same, while the balance of where the island had been was then in the channel.

Some of defendant's witnesses say this island did not all cave away. The colored witness, Miller, said all of it did not cave away; said that about seventy-five or eighty acres were left on the *north* end.

This witness said the island did not cave much until 1896; that prior to 1896 the big caving was not inside next to the chute, but was on the outside of the island, and at the lower end; that it caved a right smart at the lower end, and sometimes the big trees would fall in the river as it caved (R., 310).

Viewing the entire evidence, we think the court must come to the conclusion that this witness is in error when he says all of Tullos Island did not wash away.

Mr. Foster, a witness for defendant, when asked whether all of Tullos Island had washed away, answered: "It never all washed away; no, sir. If it did,

I didn't see it. All of the main part is there now. It never all washed away" (R., 209). He could not say how much was not washed away (R., 210).

Without going particularly into Mr. Foster's testimony, a careful examination of it shows that in later years he knew exceedingly little about the island, and his testimony could not outweigh the testimony of complainant's witnesses, Purnell and De Lahunt, one of whom lived on the family plantation, immediately opposite the island, and saw all of it cave away; and the other, a steamboat captain who made three trips a week by the island, passing it six times a week, and saw every vestige of it wash away.

The timber on Tullos Island, as shown by the survey of 1882, was virgin timber, cottonwood, hackberry, and gum (R., 151). Mr. Purnell said this timber was virgin growth, some oak and gum he judged four feet through. He knew one big cottonwood he judged to be seven or eight feet through (R., 262).

The timber on Newman's Towhead was nearly all cottonwood and willow, which grows principally on alluvial soil. See testimony of Captain Purnell (R., 26, 27, 32), Captain Reed (R., 100, 104, 105, 124, 125, 126), Ernest Newman (R., 53), Geo. R. Newman (R., 69, 71, 72), Mr. Beard (R., 87, 88, 89), C. H. Hume (R., 193).

Captain Reed was on this property in controversy in 1926, and the timber on it is cottonwood and willow (R., 109).

Mr. Albrittain said the timber was cottonwood and willow, oak, sycamore, and dogwood (R., 249). He did

not measure the size of any oak; he thought they were 16 or 18 inches in diameter, but just a few of them (R., 255). He was not paying any attention to their size. He did not know of many sycamore, and did not measure them. He was not paying any attention to their size at all.

He only noticed one dogwood and, as he remembered, it was about four inches in diameter (R., 256).

The court will recall that Mr. Albritton is claiming to own a part of the land in controversy (R., 253), and that he made the trip on the island when he measured the cottonwood, which was October 21, 1925 (R., 245), before the testimony was taken, and yet he says he was not paying any attention to the size of the trees.

Complainant maintains that the great preponderance of the testimony shows that all of Tullos Island, or Island 98, had entirely washed away before the survey of 1894.

Captain Marshall shows some of Tullos Island had not washed away in 1890 (R., 173). All the surveys and testimony show that the river was progressively proceeding in an easterly direction. It follows that eight years after 1882, or in 1890, there was very little of Tullos Island left. Captain Marshall did not tell the court that much of it was left, and the court would be justified in assuming that very little of Tullos Island was left in 1890.

## The Survey of 1894.

This survey was superimposed in red lines on the chart of 1882, no new chart being made.

By examining Sheet 17, of the Charts of the Mississippi River Commission Survey of 1894, superimposed as stated on the chart of 1882, it will be noted:

> "The surveys of 1882 are shown in black. The shore line surveys of 1894 by the light lines in red; full lines representing banks, and broken lines representing bars. The controlling levee lines of 1899 are shown by heavy red lines. Names of landings established since 1882 are shown in red (thus) * * *."

## Sand Bar Above Island 98.

By this survey of 1894 it is shown that the bar line from the Louisiana shore had extended over most of what was formerly the sand bar, or island, above Island 98, and that most of what had been the balance of said sand bar, or island, north and west of Island 98, was then in the channel of the river, and what little part of said sand bar that was left was attached to the southwestern part of Section 18, and the southeastern part of Section 7, and more than a mile distant from *any* of the property in controversy, and has no bearing on the case whatever, so this eleventh-hour contention is wholly unfounded.

This survey further shows that the Louisiana bar had extended over what was, in 1882, a small part of the northwest corner of Island 98, or Tullos Island. This survey also shows that said small part of the northwest corner had previously washed away, or else the bar from Louisiana could not have extended over the place where this part of the island had been.

This survey further shows that what had been the balance of Tullos Island in 1882 was then, 1894, in the channel of the river.

Unless this survey is erroneous, there was not a vestige of Tullos Island existing at the time of the survey in 1894.

Complainant does not have to depend entirely upon the surveys to show that Tullos Island or Island 98 entirely washed away.

This is shown by eyewitnesses. The following witnesses say that this island entirely disappeared: E. T. Purnell, R., 264, 265, 283; Capt. Jos. V. De Lahunt, R., 292, 293, 294; Capt. Charles H. West, R., 140, 143, 144.

The following witnesses, testifying in regard to periods from 1894 to 1897, said there was no island existing opposite Willow Point, or in Albermarle Bend: Capt. Geo. Prince, R., 25, 26, 33, 34; Capt. W. H. Reed, R., 110, 120, 121, 122; Ernest Newman, R., 54, 55, 57; George R. Newman, R., 73, 74.

**Channel East of Tullos Island, Prior to 1894.**

As defendant contends in its brief that the channel went around to the east of Tullos Island prior to the survey of the Mississippi River Commission in 1894, and that what complainant calls Newman's Towhead is really Tullos Island, and has been since prior to the survey of 1894, in so far as defendant is concerned, it matters very little what happened subsequently to that date, for the reason that there must have been

an avulsion, through Mississippi territory, at the point involved, prior to 1894, for defendant to recover. There was no avulsion between 1894 and 1912-1913, or any contention that there was.

If defendant is right in its contention that the channel went east of Tullos Island after 1882 and prior to 1894, and that Tullos Island built by accretion westward to Louisiana, the subsequent changes to 1913 are wholly immaterial to its case.

If the evidence shows such not to be the fact, then the subsequent changes are likewise immaterial to defendant's case.

For the property in controversy to be Mississippi territory, there must have been an avulsion at the point in controversy, prior to 1894.

There are only two periods that defendant suggests such possibility, one at some indefinite time prior to 1882, and the other between 1882 and 1894, when it claims that the channel cut around to the east of Tullos Island, leaving Tullos Island intact.

If the Court is satisfied that the preponderance of the evidence negatives both contentions, it must decide in favor of complainant.

## Estoppel.

Defendant contends that the sovereignty of the State of Mississippi has been recognized by the State of Louisiana over the property in question, and therefore that even if its contention is not correct as to

the boundary line, that complainant has estopped itself from disputing that the boundary line is as contended by defendant.

When the defendant sets up the plea of estoppel, it becomes a plaintiff, for that purpose, and the burden of proof is upon it to make good this special defense.

This principle that defendant is contending for is based upon the idea that where one State knowingly permits another for a great length of time to remain in continuous, uninterrupted, peaceable, public and unequivocal possession as owner of a part of its territory, exercising dominion thereover, and defendant's rights are acquired thereunder, the State so permitting same will not thereafter be heard to say that such property did not belong to the State so exercising dominion.

The facts in this case are that Newman's Towhead was on Newman's Bar, adjoined to the Willow Point Plantation belonging to Walter R. Newman; that it was called Newman's Towhead because it was owned by Mr. Newman; that Mr. Newman had actual possession thereof and pastured his cattle thereon, and until after the avulsion of 1913 the witnesses had never heard of any one in Mississippi claiming the ownership of said property. The testimony shows that R. F. Learned & Son, owners of Willow Point under a Louisiana title, leased this property to Laurence Townes for a number of years.

The fact that property occupying the location that Tullos Island and what was formerly Mississippi

property once occupied, but which in fact had washed away, and the locality covered by Louisiana property was still assessed in Mississippi and sales still made in Mississippi as Mississippi territory, could have no possible bearing, when the citizens of the State of Louisiana were exercising actual and sole dominion over the property, without any knowledge on their part of such assessments and sale in Mississippi.

There is no evidence to show that either the State of Louisiana, or any of its citizens, knew of such assessments and sales, and in order for them to have recognized the title of Mississippi to this property, they must have had knowledge of such facts and acquiesced therein, and the burden of showing that is upon the State of Mississippi, which it has not discharged.

It is said that a drowning man will grab at a straw, and this principle seems applicable in this case, and shows to what desperate straits the defendant is driven. There is nothing in this contention.

In conclusion, complainant contends that it has established that the boundary between the States of Louisiana and Mississippi at the point in controversy, as shown by the record, is the old channel of the Mississippi River, which was abandoned as a result of the avulsion of 1912, and that the boundary in said old channel was changed eastwardly by accretion to Newman's Towhead, after the avulsion, as long as the water continuously flowed through said abandoned channel.

Complainant prays that your Honors so hold, and that you appoint a commission to ascertain and mark the said boundary line.

Respectfully submitted,

PERCY SAINT,
*Attorney General of Louisiana.*
GERARD BRANDON,
JOHN DALE,
ROBERT ASH,
*Of Counsel for the State of Louisiana.*

PHILIP HOUGH,
GERARD H. BRANDON,
JOHN DALE, JR.,
L. D. DALE,
*Solicitors for State of Louisiana.*